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Issue Date: 05 May 2004

CASE NO.: 2003-LHC-00581

OWCP NO.: 14-136401

In the Matter of:

JEFFREY T. ROOTS,
Claimant,

vs.

COLUMBIA GRAIN,
Employer,

LIBERTY NORTHWEST,
Carrier,

OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-interest,

and

ILWU-PMA[1] WELFARE PLAN,
Intervenor.

Appearances: Charles Robinowitz, Esquire
For the Claimant

Delbert J. Brenneman, Esquire
For Columbia Grain / Liberty Northwest

Matthew J. Vadnal, Esquire
For Office of Workers' Compensation Programs

Beth A. Ross, Esquire
For ILWU-PMA Welfare Fund

Before: Jennifer Gee
Administrative Law Judge

[1] International Longshore and Warehouse Union ("ILWU") - Pacific Maritime Association ("PMA")

DECISION AND ORDER ON MOTION FOR MODIFICATION

This matter involves a claim for disability benefits filed by the Claimant, Jeffrey Roots, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("the Act"). At the hearing on May 20, 2003, in Portland, Oregon, the Claimant sought a determination of temporary and permanent disability arising from industrial injuries he suffered on August 23, 2001, when he injured his back while working for Columbia Grain.

On February 27, 2004, I issued a Decision and Order granting the Claimant temporary total and permanent partial disability benefits. I found that the Claimant's average weekly wage at the time of his injury was $1,438.44, and that his adjusted post-injury wage earning capacity was $1,155.63. In addition, I found that the Employer was not entitled to Section 8(f) Special Fund relief. The Respondent has filed a Motion for Reconsideration asking that:

1. The Claimant's average weekly wage be recalculated;

2. The temporary total disability award be vacated;

3. The permanent partial disability award also be vacated.

1. Average Weekly Wage

Respondents argue that, instead of section 10(a), section 10(c) should have been applied to decide the Claimant's average weekly wage in this case. However, section 10(a) was correctly applied as the Claimant worked in the same employment in which he was working at the time of the injury, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a). Section 10(c), on the other hand, only applies when it is unreasonable or unfair to apply sections 10(a) or 10(b). 33 U.S.C. § 910(c).

Respondents further argue that even applying section 10(a), the Claimant should not have been classified as a six-day a week worker, but instead, a five-day a week worker. The Respondents explain that, if the Claimant worked 282 days in the 52 weeks preceding his injury, this is approximately 5.4 days per week (282 divided by 52 = 5.4), which should be rounded down to classify the Claimant as a five-day a week worker. However, as the Claimant points out, the Respondents' calculations are incorrect because they do not incorporate the Claimant's 11 paid holidays during the 52-week period.

As stated in the Decision and Order issued on February 27, 2004, in the 52-week period before his injury, the Claimant worked 282 days and was paid for 11 holidays, for a total of 293 days. Based on these 293 days, the Claimant worked approximately 5.6 days per week (293 divided by 52 = 5.6), which, rounded up, classifies the Claimant as a six-day a week worker. Accordingly, the Claimant's daily wage is $249.33. Under the formula for a six-day worker ($249.33 multiplied by 300), the Claimant's average annual earnings are $74,799.00, and the Claimant's average weekly wage is thereby $1,438.44.

In sum, the Claimant's average weekly wage was correctly calculated in the February 27, 2004, Decision and Order. As such, the Respondents' request that section 10(c) be applied in determining the Claimant's average weekly wage is hereby DENIED. In addition, the Respondents' request that the Claimant be treated as a five-day a week worker, for purposes of calculating his average annual earnings under section 10(a), is also hereby DENIED.

2. Temporary Total Disability Award

Claimant's Inability to Work and Dr. Pribnow's Finding of Claimant's Ineligibility for Work

Respondents argue that the Claimant is not entitled to temporary total disability benefits after August, 2001. They allege that the February 27, 2004, Decision and Order ignores the Claimant's burden to prove that he was totally disabled and diligently sought work that was available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1931 (5th Circuit 1981). The Respondents state that, despite his work release from Dr. Pribnow, the Claimant merely appeared at the Employer's plant on August 30, 2001, and claimed that he could not work. The Respondents also allege that the Claimant never returned to his doctor thereafter to have his work release modified.

The Claimant's burden to prove that he was totally disabled after August 2001, was certainly not ignored in the February 27, 2004, Decision and Order. In fact, the explanation of the Claimant's entitlement to temporary total disability benefits was divided by time periods, in order to set apart the different grounds for entitlement during each time period. In addition, the Claimant did indeed return to his treating doctor after he felt incapable of working on August 30, 2001, and was successful in obtaining a modification of his work eligibility. In reports dated September 5, 12, and 19, 2001, Dr. Pribnow stated that the Claimant was not eligible for modified work. (CX 7, p.10, 22, 25-26.) In Dr. Pribnow's September 19, 2001, report, he authorized the Claimant's time off work through October 3, 2001.[2] Thus, the record clearly supports the Claimant's ineligibility for modified work through October 3, 2001, and the Claimant is entitled to temporary total disability benefits accordingly.

Employer's Failure to Offer the Claimant a Light Duty Position

The February 27, 2004, Decision and Order awarded the Claimant temporary total disability benefits from October 3, 2001, through February 25, 2002, based on the Employer's failure to offer the Claimant suitable alternative employment. The decision emphasized an employer's duty to present jobs to a claimant, and referenced *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327, 1329 (9th Cir. 1980) and *Hairston v. Todd Shipyard Corporation*, 849 F.2d 1194, 1196 (9th Cir. 1988), two cases involving permanent total disability benefits. As stated in the Decision and Order, the rationale behind placing the burden on the Employer in permanent total disability situations should also apply to situations involving temporary total disability.

[2] Dr. Pribnow also noted that the Claimant could possibly endure "very light work," for "perhaps four hours a day," but, the Employer never proposed any jobs in response to the doctor's recommendation.

The Decision and Order explained that Dr. Pribnow, and Certified Rehabilitation Counselors Elayne G. Leles, Thomas P. Weiford, and Roy S. Katzen, agreed that the Claimant could perform the following light duty positions: Barge Screw Key Car Controller, Car Grain Controller, Master Console Operator or Secondary Master Console Operator. However, it stressed the fact that the Employer *failed to offer* any of these positions to the Claimant.

The Respondents claim that they met the requirements of offering the Claimant a job. However, the only job offer in the record occurred in August of 2001 (EX 7, p. 8; HT, p. 108-09), after which Dr. Pribnow found the Claimant to be ineligible for modified work. There is no record that the Claimant was offered any other light duty positions thereafter.

The Respondents argue that the Claimant in this case was required to diligently seek out suitable jobs. *New Orleans Stevedores (Gulfwide) v. Turner*, 661 F2d 1031 (5th Cir 1981). In support of this assertion, the Respondents cite a Fifth Circuit case, which references the more stringent standard used by the Ninth Circuit in *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327, 1329 (9th Cir. 1980). The Fifth Circuit criticized the Ninth Circuit's approach, stating its standard "make[s] the employer, in effect, an employment agency, required to secure specific positions for a claimant to satisfy the millstone of proof." *Turner*, 661 F.2d at 1042. Unfortunately for the Respondents, this Portland, Oregon case falls within the jurisdiction of the Ninth Circuit, and the stringent standard set forth in *Bumble Bee Seafoods* controls.

Respondents also argue that the Claimant is not entitled to temporary total disability benefits for August 24 or 25 under Section 906 of the Act because Dr. Pribnow determined that he was able to return to work on August 29, and the three-day waiting period would preclude him from recovering for those two days. This argument overlooks the fact that I found that the Claimant was unable to return to work on August 29 and awarded him disability benefits for that day as well. Thus, the three-day waiting period does not apply in this case.

Although light duty positions may have been available and suitable for the Claimant, the Claimant is still entitled to temporary total disability benefits because he was *never* offered any of the positions. It is only after the fact that the Respondents have shown the existence and suitability of these positions. Accordingly, the Respondents' request that the temporary total disability award be vacated is hereby DENIED.

3. Permanent Partial Disability Award

Respondents argue that the Claimant is not entitled to permanent partial disability benefits because his actual post-injury earnings are not an accurate reflection of his earning capacity, and that he is capable of working without any loss in earnings. The Respondents assert that, if the Claimant so desired, he could have worked more hours than he actually did.

The Respondents fail to consider that since his August 23, 2001 injury, the Claimant's endurance level has decreased and he now encounters difficulty with lifting. (HT, p. 128-29.) Because of these newfound problems, the Claimant no longer takes interest in overtime opportunities. (HT, p. 127.)

The Respondents propose that the Claimant's post-injury earnings be calculated by the same method used to calculate his pre-injury earnings, instead of by the method that incorporates cost-of-living or hourly pay rate adjustments. However, the Respondents do not offer any legal grounds for abandoning the well-settled method of comparing the Claimant's pre-injury wages with his adjusted post-injury wages. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *see also Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Therefore, their argument is all but persuasive.

As explained in the February 27, 2004 Decision and Order, because the Claimant has not been able to resume work in the capacity he maintained before the injury, and because he is faced with a decreased wage earning capacity, the Claimant is entitled to permanent partial disability benefits. Accordingly, the Respondents' request that the permanent partial disability award be vacated, is hereby DENIED.

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JENNIFER GEE
Administrative Law Judge